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No. 06-11543

In the Supreme Court of the United States

LARRY BEGAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
LEONDRA R. KRUGER
Assistant to the Solicitor General
RICHARD A. FRIEDMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's prior felony convictions for driving while intoxicated qualify as "violent felon[ies]" under 18 U.S.C. 924(e) (2000 & Supp. II 2002).

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 78-121) is reported at 470 F.3d 964. The memorandum opinion and order of the district court (J.A. 46-52) is reported at 377 F. Supp. 2d 1141.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 2006. A petition for rehearing was denied on February 21, 2007 (J.A. 122). The petition for a writ of certiorari was filed on May 22, 2007, and was granted on September 25, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-4a.

STATEMENT

Petitioner pleaded guilty in the United States District Court for the District of New Mexico to possession of a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1). The district court determined that petitioner had at least three prior convictions for "violent felon[ies]" as defined by the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e) (2000 & Supp. II 2002),[1] which required a mandatory minimum 15-year sentence. J.A. 46-52. The court sentenced petitioner to 188 months of imprisonment. J.A. 67. The court of appeals affirmed the district court's conclusion that petitioner was subject to a mandatory minimum sentence under the ACCA, and it reversed and remanded for resentencing in accordance with *United States* v. *Booker*, 543 U.S. 220 (2005). J.A. 78-121.

1. Section 922(g)(1) of Title 18, United States Code, makes it unlawful for a person who has been convicted of a felony to possess a firearm. Violation of that provision ordinarily carries a maximum term of imprisonment of ten years. 18 U.S.C. 924(a)(2). As amended in 1986, the ACCA provides for enhanced penalties for persons convicted of violating Section 922(g)(1) who have three prior convictions "for a violent felony or a serious drug offense," 18 U.S.C. 924(e)(1). See *Taylor* v. *United States*, 495 U.S. 575, 582-588 (1990) (describing the evolution of the ACCA). The ACCA defines a "violent fel-

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[1] All subsequent citations in this brief to 18 U.S.C. 924(e) refer to 18 U.S.C. 924(e) (2000 & Supp. II 2002).

ony" as "any crime punishable by imprisonment for a term exceeding one year" that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

18 U.S.C. 924(e)(2)(B). The ACCA provides that a defendant who has been convicted of three such crimes is subject to a mandatory minimum sentence of 15 years of imprisonment. 18 U.S.C. 924(e)(1).

2. In September 2004, after a night of heavy drinking, petitioner pointed a .22 caliber rifle at his aunt and threatened to shoot if she did not give him money. When she replied that she had no money, petitioner repeatedly pulled the rifle's trigger. The rifle was unloaded, however, and did not fire. Petitioner then approached his sister and threatened her with the rifle in a similar fashion. His sister later called the police, who discovered the rifle under a mattress in petitioner's room. J.A. 47, 79; Presentence Report (PSR) ¶¶ 9-12, 66. Petitioner was arrested and charged with one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Petitioner pleaded guilty to the felon-in-possession charge. J.A. 8-13.

3. The indictment recited that petitioner had three prior felony convictions for driving while intoxicated, all entered in New Mexico. J.A. 6-7. At sentencing, it was undisputed that petitioner had been convicted on at least 12 occasions for "driving under the influence of intoxicating liquor or drugs" (DUI), in violation of N.M. Stat.

Ann. § 66-8-102 (Michie 2002).[2] J.A. 48. It was likewise undisputed that at least three of those DUI convictions constituted felonies under Section 66-8-102(G), which provides that, "[u]pon a fourth conviction pursuant to this section, an offender is guilty of a fourth degree felony" and may be sentenced to a term of imprisonment of eighteen months.[3] N.M. Stat. Ann. §§ 66-8-102(G); see J.A. 39-45 (records of judgment), 48.

Based on these felony convictions, the district court concluded that petitioner was subject to sentencing under the ACCA because his felony DUI offenses were "violent felonies" for purposes of the ACCA in that they "involve[] conduct that presents a serious potential risk of physical injury to another." J.A. 51-52; see 18 U.S.C. 924(e)(2)(B)(ii). The court accordingly found that petitioner was subject to the ACCA's mandatory minimum of 180 months of imprisonment. See 18 U.S.C. 924(e)(1). Applying the then-advisory Sentencing Guidelines, the court sentenced petitioner to 188 months of imprisonment, to be followed by three years of supervised release. J.A. 67-75.

4. The court of appeals affirmed in relevant part. J.A. 78-121. The court began by noting that, to deter-

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[2] Unless otherwise noted, all subsequent citations in this brief to N.M. Stat. Ann. § 66-8-102 refer to N.M. Stat. Ann. § 66-8-102 (Michie 2002).

[3] Under the New Mexico statutory scheme, a second DUI conviction requires a mandatory minimum sentence of "a jail term of not less than ninety-six consecutive hours, not less than forty-eight hours of community service and a fine of five hundred dollars," and a third DUI conviction requires a mandatory minimum sentence of "a jail term of not less than thirty consecutive days, not less than ninety-six hours of community service and a fine of seven hundred fifty dollars," N.M. Stat. Ann. § 66-8-102(F)(1) and (2) (Michie 2007). Cf. App., *infra*, 3a.

mine whether an offense is a "violent felony" under the ACCA, a court must employ the "categorical approach" described in *Taylor*, *supra*, and *Shepard* v. *United States*, 544 U.S. 13 (2005). J.A. 82. Following that approach, the court looked only to "the statutory definition of the crime" to determine if it qualified as a "violent felony." *Ibid.* The court concluded that felony DUI, as defined by New Mexico law, "is encompassed by the natural meaning of the statutory language 'any crime . . . that . . . involves conduct that presents a serious potential risk of physical injury to another,'" explaining that DUI "certainly presents such a risk." J.A. 91-92. The court rejected petitioner's argument that the "ordinary meaning" of "violent felony" would not encompass DUI, concluding that it should "look to the statutory definition of the term and begin with the ordinary meaning of that language rather than with the 'ordinary meaning' of the term that Congress thought it advisable to define." J.A. 92. The court also rejected the argument that the short title of the statute, "The Armed Career Criminal Act," restricts the scope of the ACCA to crimes often committed as a means of livelihood, concluding that "[i]t would be rather unusual, and disrespectful to legislative drafting, to let such a title override statutory language." *Ibid.*[4]

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[4] Although the court of appeals affirmed the district court's application of the 180-month mandatory minimum pursuant to the ACCA enhancement, it unanimously held that the district court erred in imposing a 188-month sentence on the understanding that, "in order for me to go below the guidelines, I have to make a finding that, under the sentencing factors, [a] sentence of 188 months [would be] unreasonable." J.A. 99. The court of appeals remanded for resentencing, explaining that a court "may impose a non-Guidelines sentence if the sentencing factors set forth in [18 U.S.C.] 3553(a) warrant it, even if a Guidelines sentence might also be reasonable." J.A. 100-101.

In separate opinions, Judge Hartz and Judge Lucero each rejected petitioner's contention that the ACCA's "otherwise" clause does not encompass all offenses that "involve[] conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii), but rather only those offenses similar in kind to those enumerated in the statute: namely, burglary, arson, extortion, and offenses involving the use of explosives.

Judge Hartz concluded that neither the purpose of the statute, its history, or application of canons of construction could override the ordinary meaning of the definition of "violent felony" as encompassing all felony offenses involving a serious risk of physical injury. First, Judge Hartz concluded that, because the ACCA's statutory purpose is to punish more severely those felons in possession "who have a confirmed history of displaying contempt for human life or safety, * * * * there is nothing remarkable about including felony [DUI] as a 'violent felony.'" J.A. 94. Turning to the legislative history of the "otherwise" clause, Judge Hartz noted that the references to burglary, arson, extortion, and offenses involving the use of explosives were added to the definition *after* Congress had already defined "violent felony" as, inter alia, a felony that involves "conduct that presents a serious potential risk of physical injury to another." J.A. 96. Judge Hartz took the view that the "more plausible" interpretation of this chronology was that Congress added the reference to the specific offenses only to make clear that the term "violent felony" encompassed the newly listed offenses in addition to a wide range of other safety-threatening offenses like DUI, rather than to limit the scope of the definition. J.A. 96-97. But he concluded that the history was in any event ambiguous, and "not particularly persuasive either

way." J.A. 95-97. Finally, Judge Hartz rejected petitioner's invocation of the canons of *ejusdem generis* and *noscitur a sociis* to argue that the conduct encompassed by the "otherwise" clause must be similar in kind to burglary, arson, extortion, and explosives use. He noted that the "primary definition" of the word "otherwise" is "in a different way or manner," such that the clause that follows that word is properly understood to include "conduct that presents (*in a manner different from* burglary, arson, etc.) a serious risk of physical injury to another," J.A. 98. Thus, he concluded, "[t]he use of *otherwise* in the statute negates the two canons." *Ibid.*

In a short concurring opinion, Judge Lucero agreed that "a conviction for felony driving while under the influence falls within the ambit" of Section 924(e)(2)(B)(ii). J.A. 104. Judge Lucero concluded that "the language of the statute is so clear and unambiguous that it does not allow resort to the legislative history." *Ibid.* Judge Lucero observed that DUI "may not have been in the minds of the 1986 amendment's sponsors when they drafted [Section 924(e)(2)(B)(ii)'s] residual language," but concluded that, given the clarity of that language, "[i]f a change is to be made, it is for Congress, not the courts, to make." *Ibid.*

Judge McConnell dissented. J.A. 104-121. Judge McConnell took the view that "[b]y using the word 'otherwise,' Congress indicated a substantive connection between the enumerated crimes and the general phrase." J.A. 110. He concluded, based on the legislative history and purpose of the statute, as well as application of the canons of *ejusdem generis* and *noscitur a sociis*, that the ACCA's "otherwise" clause "should be restricted to violent, active crimes which, like burglary, arson, extortion, and crimes involving explosives, are typical of ca-

reer criminals, and which are more dangerous when committed in conjunction with firearms." J.A. 119.

SUMMARY OF ARGUMENT

Petitioner's felony convictions for driving while intoxicated constitute "violent felon[ies]" within the meaning of the Armed Career Criminal Act because that offense "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(E)(2)(B)(ii). A person who exercises control of a vehicle while intoxicated runs a substantial risk that he will injure or even kill pedestrians, passengers, and other drivers. Recidivism—the prerequisite for felony treatment of petitioner's offenses—greatly enhances that risk, because the repetition of the offense evinces increased recklessness about the potential for inflicting harm.

A. In *James* v. *United States*, 127 S. Ct. 1586 (2007), this Court confirmed that an offense qualifies as a "violent felony" under the ACCA if, by its nature, it poses a serious risk of physical injury to others. That is the case with respect to felony driving under the influence (DUI). As this Court has long recognized, drunk driving takes an enormous toll in lives and injuries. DUI laws exist for precisely this reason: State legislatures have determined that DUI presents a sufficiently significant danger to the public that it warrants criminal penalties, and that repeat offenses are sufficiently serious as to warrant enhanced penalties. Empirical studies confirm the States' determination. Like the offenses Congress specifically enumerated in Section 924(e)(2)(B)(ii)—namely, burglary, arson, extortion, and offenses involving the use of explosives—recidivist drunk driving poses serious risks of harm. The Sentencing Commission apparently

concurs in that view. Although it has acted to exempt the crime of felon-in-possession from the Guidelines cognate "crime of violence" provision, Guidelines § 4B1.2(a)(2), it has never repudiated the court of appeals' uniform conclusion that felony DUI is an offense that presents a serious risk of physical injury to others.

Petitioner argues that, under the categorical approach of *Taylor* v. *United States*, 495 U.S. 575 (1990), his New Mexico DUI offenses do not implicate sufficient risk. That claim misreads state law and unjustifiably minimizes the risks that the DUI offense poses. Merely driving after consuming alcohol is not sufficient to constitute DUI; a driver must be actually impaired or have a .08 blood or breath alcohol level, a level at which studies show virtually all drivers are impaired. And although it may be possible to hypothesize situations in which operating a vehicle while impaired by alcohol might not pose a serious risk to others, it is not necessary that *every* application of the statute pose a serious risk; it is enough that the conduct covered by New Mexico's DUI statute poses a serious risk "in the ordinary case." *James*, 127 S. Ct. at 1597.

B. Petitioner's primary contention is that an offense not specifically enumerated in clause (ii) of the definition of "violent felony" should qualify as a predicate offense only if it is "similar" to the enumerated offenses of burglary, arson, extortion, and explosives use in that it is a "violent, active property crime that is typically committed by career criminals as a means of livelihood and that is more dangerous when committed with a firearm." Pet. Br. 14. That definition could be a plausible, if somewhat difficult to apply, legislative option, but it is not the one Congress adopted. None of those limitations appears anywhere in clause (ii). Nor do the enumerated

crimes share all of the attributes that petitioner would ascribe to them. Congress drafted the ACCA's definitional provision deliberately, and that provision itself identifies the sole defining characteristic of crimes that fall within the scope of Section 924(e)(2)(B)(ii): that the offense involve conduct that presents a serious risk of physical injury to others.

Because the text of Section 924(e)(2)(B)(ii) is clear and unambiguous, plaintiff's efforts to identify additional limitations in the term "violent felony," which that Section defines, are unavailing. Unlike in *Leocal* v. *United States*, 543 U.S. 1 (2004), which concerned whether DUI qualified as a "crime of violence" under 18 U.S.C. 16, which defines the term to include offenses involving the "use" or risk of "use" of force, the language of the ACCA's definition provision is not susceptible of varying interpretations. *Leocal* itself distinguished the "use" of force language in Section 16 from the "serious potential risk of physical injury" formulation that Congress employed in Section 924(e)(2)(B). Petitioner's argument would collapse the two. Any preconception of how the term "violent felony" might be used in other contexts cannot override the plain meaning of the words Congress actually used to define the term for purposes of the ACCA.

Nor can the title of the Act (the "Armed Career Criminal Act") be understood to narrow the scope of the Section 924(e)(2)(B); titles are of use only when they shed light on statutory ambiguity, which does not exist here. Even if, as petitioner argues, Congress's purpose when it initially enacted the ACCA was to target criminals who made their living by engaging in certain forms of criminal activity, when it drafted Section 924(e)(2)(B) to expand the range of predicate offenses covered by the

statute, it did not limit the covered offenses solely to crimes ordinarily committed as a means of livelihood. Arsonists and those who use explosives do not ordinarily do so as a matter of vocation; nor are their crimes necessarily more dangerous if committed in conjunction with possession of a firearm.

Petitioner also errs in suggesting that predicate crimes in the ACCA's "otherwise" clause must have *mens rea*. The presumption of *mens rea* applies to the *elements* of an offense, not to a sentencing factor. In any event, DUI is almost invariably the product of knowing conduct and has an inherent mental state of recklessness. States do not require an additional mental element because it would be absurd to require proof of a mental state for DUI that intoxication itself might negate.

C. Petitioner relies on the legislative history, the canon of constitutional avoidance, and the rule of lenity in an effort to prevent application of the plain statutory text. The legislative history, to the extent it is relevant, supports the view that Congress's goal in drafting Section 924(e)(2)(B)(ii) was to reach felonies that inherently present a risk of harm to others, and that it added specific references to the enumerated crimes to add certainty, not to limit what became the "otherwise" clause. The principle of constitutional avoidance has no application here, because, as this Court held in *James*, the statute is not vague; the determinations it requires are well within the competence of the judiciary; and the legal elucidation of the statute implicates no Sixth Amendment issue. Finally, the rule of lenity is inapplicable, because the language of the statute is not ambiguous. Under a straightforward application of the text, felony DUI qualifies as a predicate offense under the ACCA.

D. Finally, petitioner argues (for the first time in any appellate proceedings in this case) that his offenses were not punishable by more than one year of imprisonment. Even though petitioner himself, as a repeat offender, faced sentences of at least 18 months for his fourth and successive DUI offenses, he relies on the fact that a first, second, or third offense is a misdemeanor. As the government explains in *United States* v. *Rodriquez*, No. 06-1646 (to be argued Jan. 15, 2008), for purposes of the ACCA, the relevant "maximum term of imprisonment" for a repeat offender is the maximum sentence prescribed by law for recidivists. It would be bizarre if the "maximum term of imprisonment" for petitioner's repeat-offender crimes were lower than the terms of imprisonment that petitioner actually received.

ARGUMENT

PETITIONER'S FELONY CONVICTIONS FOR DRIVING UNDER THE INFLUENCE QUALIFY AS "VIOLENT FELONIES" UNDER THE ARMED CAREER CRIMINAL ACT

The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e) (2000 & Supp. II 2002), defines a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that "has as an element the use, attempted use, or threatened use of physical force against the person of another," or "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B). Petitioner's felony DUI convictions qualify as violent felonies under that definition because repeated DUI violations involve "conduct that presents a serious potential risk of physical injury to another." The court of appeals'

decision accords with the decisions of every other court of appeals to address the issue.[5]

A. Recidivist Drunk Driving Under New Mexico Law Qualifies As A "Violent Felony" Under The ACCA Because It Involves Conduct That "Presents A Serious Risk of Physical Injury to Another"

Driving while intoxicated poses a significant danger because a driver who is impaired by alcohol poses a heightened danger of causing an accident that can result in injury or death. See, *e.g.*, *Michigan* v. *Sitz*, 496 U.S. 444, 451 (1990) ("No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it."). A recidivist offense that qualifies as a felony entails an increased risk because the repetition of the offense displays an enhanced degree of recklessness towards others' safety. The ACCA's residual clause classifies a crime as "violent felony" based on the determination that the conduct involved in the offense "presents a serious potential risk

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[5] See *United States* v. *McCall*, 439 F.3d 967, 971-972 (8th Cir. 2006) (en banc); *United States* v. *Sperberg*, 432 F.3d 706, 708-709 (7th Cir. 2005). Courts of appeals have also uniformly reached the same conclusion with respect to the materially identical language of Sentencing Guidelines § 4B1.2(a)(2), which defines the term "crime of violence" to include, inter alia, a felony that "is burglary of a dwelling, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another.*" U.S.S.G. § 4B1.2(a)(2) (emphasis added); see *United States* v. *Veach*, 455 F.3d 628, 636-637 (6th Cir. 2006); *United States* v. *McGill*, 450 F.3d 1276, 1279-1280 (11th Cir. 2006); *United States* v. *Moore*, 420 F.3d 1218 (10th Cir. 2005); *United States* v. *DeSantiago-Gonzalez*, 207 F.3d 261, 264 (5th Cir. 2000); *United States* v. *Rutherford*, 54 F.3d 370 (7th Cir.), cert. denied, 516 U.S. 924 (1995).

of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). Felony DUI satisfies that standard.

1. In *James* v. *United States*, 127 S. Ct. 1586 (2007), this Court clarified the meaning of ACCA's "otherwise" clause in considering whether attempted burglary qualifies as a "violent felony" within the meaning of Section 924(e)(2)(B)(ii). Rather than seek a textually unspecified common denominator in the four crimes that precede Section 924(e)(2)(B)(ii)'s "residual provision" for crimes that "otherwise involv[e] conduct that presents a serious potential risk of physical injury to another," *James*, 127 S. Ct. at 1591, the Court focused on the only common attribute the provision identifies. It thus confirmed that a felony offense qualifies as a "violent felony" under ACCA's residual provision "[a]s long as [the] offense is of a type that, by its nature, presents a serious potential risk of injury to another." *Id.* at 1597. Finding that the degree of risk posed by attempted burglary is comparable to the risk posed by burglary, an offense specifically enumerated in the statute, the Court in *James* held that attempted burglary falls within the ACCA's residual provision. *James* made clear several propositions that demonstrate why the residual provision covers felony DUI as well.

First, like the court of appeals in this case (J.A. 82), the Court in *James* employed the "categorical approach" of *Taylor* v. *United States*, 495 U.S. 575 (1990), to determine whether attempted burglary falls within the ACCA's residual provision. *James*, 127 S. Ct. at 1593-1594; accord *id.* at 1602 (Scalia, J., dissenting). Under that approach, a court looks to the statutory definition of the offense to determine "whether the *elements of the offense* are of the type that would justify its inclusion within the residual provision, without inquiring into the

specific conduct of this particular offender." *Id.* at 1594; accord *Shepard* v. *United States*, 544 U.S. 13, 17 (2005); *Taylor*, 495 U.S. at 600, 602.

Second, and also like the court of appeals in this case (J.A. 97-98, 104), this Court held that an offense not specifically enumerated in clause (ii) of the statute qualifies as an ACCA predicate if it "involves conduct that presents a serious potential risk of physical injury to another," whether or not the offense is in other respects "of the same type" as the enumerated offenses of burglary, arson, extortion, and explosives use. *James*, 127 S. Ct. at 1591-1592. Although the Court acknowledged that the enumerated offenses may provide "one baseline from which to measure" whether other conduct presents a serious risk of injury, *id.* at 1594, it explained that "Congress' inclusion of a broad residual provision * * * indicates that it did not intend the preceding enumerated offenses to be an exhaustive list of the types of crimes that might present a serious risk of injury to others and therefore merit status as a § 924(e) predicate offense," *id.* at 1593; see also *id.* at 1602-1603 & n.1, 1609 (Scalia, J., dissenting) (noting that the "defining characteristic of the residual provision" is "serious potential risk of physical injury to another" and that "the four [listed] examples have little in common").

Finally, the Court held that, because "potential risk" are "inherently probabilistic concepts," application of the categorical approach to the residual provision does not mean that *all* cases that would arise under the statute of conviction must present a serious potential risk of physical injury to another. *James*, 127 S. Ct. at 1597. "Rather, the proper inquiry is whether the conduct encompassed by the elements of the offense, *in the ordi-*

nary case, presents a serious potential risk of injury to another." *Ibid.* (emphasis added).

2. Felony DUI is an offense that by its nature presents a serious potential risk of physical injury and, therefore, based on the analysis in *James*, it is covered by the ACCA.

a. It is precisely because drunk driving categorically poses a risk of physical injury to others that it is a criminal offense under the laws of New Mexico, as well as every other State.[6] The DUI statute under which petitioner was convicted rests on a legislative judgment that "[i]ntoxicated drivers place the public, as well as themselves, at risk." *State* v. *Johnson*, 15 P.3d 1233, 1239 (N.M. 2000). The statute was enacted for the very purpose of protecting the public from the "potential harm posed by intoxicated drivers"—a "potential harm" that New Mexico deems "so compelling" as to warrant criminal penalties. *Id.* at 1239-1240.

In New Mexico, as in other states, a first-offense DUI is generally a misdemeanor offense. N.M. Stat. Ann. § 66-8-102(E) and (F). Individuals who *repeatedly* drive while intoxicated, however, are subject to felony convictions for that offense. *Id.* § 66-8-102(G) (making a fourth and subsequent DUI offense a fourth-degree felony). The penalties for repeat offenders are the product of "gradual and consistent increases in punishment * * * adopted to counter the problem of [driving while intoxicated]," *State* v. *Anaya*, 933 P.2d 223, 228 (N.M. 1996), and reflect a commonsense judgment that a person who *repeatedly* violates the DUI law, and does so despite escalating sanctions, poses a grave risk of physi-

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[6] National Conf. of State Legislatures, *State .08 BAC Laws* (July 2004) (*State .08 BAC Laws*)<http://www.ncsl.org/programs/lis/dui/bac08.html>.

cal injury to others. See *United States* v. *McCall*, 439 F.3d 967, 972 (8th Cir. 2006) (en banc).

b. The legislative judgment of New Mexico and other States is confirmed by numerous studies showing that drunk driving generally—and repeated drunk driving in particular—poses a serious risk of injury. For decades, this Court "has repeatedly lamented the tragedy" of "the carnage caused by drunk drivers." *South Dakota* v. *Neville*, 459 U.S. 553, 558 (1983). In 2006, 17,602 persons died from alcohol-related motor vehicle crashes in the United States, which represents more than 41% of all traffic-related deaths. Of the total number of alcohol-related fatal crashes, 15,121, or 86%, involved drivers with a blood alcohol concentration of 0.08 or higher.[7] And of this group of drivers, 80% were drivers who had one or more prior DUI convictions.[8] Studies show that, while the proportion of repeat offenders is relatively small relative to the general population,

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[7] NHTSA, *Traffic Safety Facts* tbl. 1 (Aug. 2007) (*NHTSA Safety Facts*) <http://www.nhtsa.dot.gov/portal/nhtsa_static_file_downloader.jsp?file=/staticfiles/DOT/NHTSA/NCSA/Content/RNotes/2007/810821.pdf>. In an effort to downplay the risks associated with drunk driving, petitioner's amicus asserts that NHTSA studies in fact show that alcohol is "involved" in only 2% of all motor vehicle crashes. NACDL Br. 3. The study on which petitioner's amicus relies for that proposition, however, merely shows that, of the 6,002 persons who responded to a telephone survey, those who had been involved in car crashes attributed the crash to alcohol consumption only 2% of the time. See NHTSA, *National Survey of Drinking and Driving Attitudes and Behaviors, 2001*, Traffic Tech 280, at 2 (June 2003) <http://www.nhtsa.dot.gov/people/injury/research/Traffic-Tech2003/TT280/pdf>. This survey says nothing about the rate at which alcohol-related accidents actually occur, or about the prevalence of a nexus to alcohol in fatal crashes.

[8] *NHTSA Safety Facts* tbl. 10.

repeat offenders are "disproportionately responsible for alcohol-related crashes and other problems associated with drunk driving."[9] A person with multiple DUI convictions is far more likely to drive with a high blood alcohol content, and is thus far more likely to cause a fatal accident.[10]

c. The risks associated with felony drunk driving are comparable *in kind* to the risks associated with the offenses enumerated in Section 924(e)(2)(B)(ii)—burglary, arson, extortion, and crimes involving the use of explosives. Any of those offenses can cause bodily injury to another. The risks of drunk driving are also comparable, if not greater, *in degree*. Hard statistical evidence of the magnitude of the risk of these crimes may not be available, nor is it obvious that the risk is uniform with respect to the four enumerated crimes. Likewise, there is no evidence that Congress intended analysis to proceed by comparative statistical analysis, as opposed to judicial judgment about the seriousness of the risk.[11]

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[9] Office of Community Oriented Policing Servs., U.S. Dep't of Justice, *Drunk Driving, Problem-Oriented Guides for Police, Problem-Specific Guides Series No. 36*, at 4 (Feb. 2006) (*Problem-Specific Guides*) <http://www.cops.usdoj.gov/mime/open.pdf?Item=1042> (footnote omitted); see generally Robert D. Brewer et al., *The Risk of Dying in Alcohol-Related Automobile Crashes Among Habitual Drunk Drivers*, 331 New Eng. J. Med. 513 (1994).

[10] *Problem-Specific Guides* 4.

[11] In *James*, the Court conducted a qualitative, rather than quantitative, evaluation of the risk associated with attempted burglary, using burglary as "one baseline from which to measure" whether attempted burglary involves conduct that "presents a serious potential risk of physical injury." 127 S. Ct. at 1594-1595. Although the principal dissent disagreed with the Court's evaluation of that risk, it conducted a similar qualitative comparison. *Id.* at 1607-1608 (Scalia, J., dissenting). As the dissent acknowledged, under the ACCA, courts must

But the degree of risk associated with the listed offenses is undoubtedly substantial, even though the statistical likelihood of injury in any given offense may be relatively small.[12] As with arson and explosives use, any drunk driver presents a risk of injury to others by exposing the public to an inherently dangerous activity—here, the operation of a vehicle by a driver who is impaired by alcohol. The risk, however, is far more substantial when a person drives drunk *repeatedly*, thereby displaying a heightened degree of indifference to the risk that his behavior entails. In so doing, he endangers the life of every person he passes.[13] And a drunk driver's victims have no warning of the danger they face, and thus have no way to protect themselves against it.

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decide, "without hard statistics to guide them, * * * the degree of risk of physical injury posed by various crimes." *Id.* at 1608 (internal quotation marks omitted).

[12] See, *e.g.*, U.S. Fire Admin., Dep't of Homeland Security, *Arson in the United States, Topical Fire Research Series* (Jan. 2001) <http://www.usfa.dhs.gov/downloads/pdf/tfrs/v1i8-508.pdf> (reporting that, of the 267,000 fires attributed each year to arson, there are approximately 2000 injuries and 475 deaths).

[13] Relying on an affidavit of Dr. Paul Zador, which was submitted for sentencing purposes in the United States District Court for the Western District of Texas, petitioner's amicus contends that the "probability of a given drunk driver harming someone else is very low." NACDL Br. 15. Dr. Zador's affidavit, however, emphasizes that "there is no valid national study in existence which answers th[at] specific question," NACDL Br. App. 4a, and his attempt to derive a single numerical answer necessarily rests on a series of speculative estimates. In any event, the question Dr. Zador asks is of limited relevance here, where the issue is not the risk of harm associated with isolated drunk-driving incidents, but the risk of harm posed by repeat offenders, a small group of individuals who are disproportionately responsible for alcohol-related crashes. See note 8, *supra*, and accompanying text.

d. The United States Sentencing Commission apparently shares the view that felony DUI is properly viewed as a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another," Guidelines § 4B1.2(a)(2). See *James*, 127 S. Ct. at 1596 (noting that the Commission has access to and relies on "empirical sentencing data" in framing the Guidelines, and treating the Sentencing Commission's conclusion that attempt crimes are covered as "crimes of violence" as "further evidence" that attempted burglary is covered under ACCA).

Beginning in 1995, the courts of appeals have consistently concluded that felony DUI falls within the comparably worded "otherwise" clause of Guidelines § 4B1.2(a)(2). See *United States* v. *Rutherford*, 54 F.3d 370 (7th Cir.), cert. denied, 516 U.S. 924 (1995); note 5, *supra* (citing cases). Although Congress provided that the Commission "periodically shall review and revise" the Guidelines, 28 U.S.C. 994(*o*), and thereby clarify them in response to judicial decisions, see *Braxton* v. *United States*, 500 U.S. 344, 348 (1991), the Commission has never amended Section 4B1.2 or its commentary to repudiate those decisions. That stands in contrast to the Commission's amendment of the Guidelines' commentary specifically to state that "'[c]rime of violence' does not include the offense of unlawful possession of a firearm by a felon," U.S.S.G. § 4B1.2 comment. (n.1). See *Stinson* v. *United States*, 508 U.S. 36, 47 (1993) (holding that the Commission's commentary excluding felon-in-possession offenses is binding because "it is not 'plainly erroneous or inconsistent' with § 4B1.2").

As the court of appeals recognized in *Rutherford*, felon-in-possession offenses are readily distinguishable from felony DUI offenses. "Possession of a firearm does

not in itself create a risk of injury; an offender must make a subsequent volitional choice (only tangentially related to the offense of possession) to fire or recklessly brandish the weapon. A decision to drive drunk is reckless from the start; no subsequent volitional act is necessary to create the risk." 54 F.3d at 377 n.15. The Commission's exclusion of felon-in-possession offenses from Section 4B1.2 thus logically accords with its action in leaving the decisions including felony DUI offenses undisturbed. It may be taken as some additional support for the commonsense view that DUI poses serious potential risks of physical injury.

e. Petitioner contends (Pet. Br. 41-44) that DUI, as defined by New Mexico law, does not "categorically" present a serious risk of injury within the meaning of *Taylor*, *supra*, because a person can violate the New Mexico DUI statute by (1) driving while impaired to "the slightest degree" by alcohol; (2) driving with a .08 blood or breath alcohol level; or (3) exercising control over a vehicle "while safely parked on private property." Pet. Br. 42. Petitioner's argument overlooks the meaning of the statute as defined by the State and the seriousness of the conduct that it prohibits.

First, N.M. Stat. Ann. § 66-8-102(A) provides that "[i]t is unlawful for a person who is under the influence of intoxicating liquor to drive a vehicle within this state." New Mexico courts have interpreted the phrase "under the influence of intoxicating liquor" to mean that "intoxicating liquor" has affected the driver "so that, to the slightest degree, he is less able * * * to exercise the clear judgment and steady hand necessary to handle * * * [an] automobile with safety to himself and the public." *State* v. *Sisneros*, 82 P.2d 274, 278 (N.M. 1938) (internal quotation marks and citation omitted). Simply

driving after consuming alcohol is not "driving under the influence" within the meaning of this definition. *Ibid.* Rather, the central question under Section 66-8-102(A) is whether alcohol has impaired the driver's ability to handle an automobile safely. Such impairment is generally proved by behavioral evidence, such as erratic driving, failed sobriety tests, and slurred speech. See, *e.g.*, *State* v. *Notah-Hunter*, 113 P.3d 867, 873-874 (N.M. Ct. App. 2005); *State* v. *Gutierrez*, 909 P.2d 751, 753 (N.M. Ct. App. 1995). Driving while impaired by alcohol within the meaning of Section 66-8-102(A) is categorically a injury-risking activity.

Driving a vehicle with a .08 blood or breath alcohol level, which constitutes a per se violation of the statute, N.M. Stat. Ann. § 66-8-102(C), is also inherently injury-risking behavior. Studies show that "[v]irtually all drivers, even those who are experienced drinkers, are *significantly* impaired at a .08 [blood alcohol concentration]."[14] Drivers with blood alcohol concentrations of .08 to .09 are anywhere from 11 to 52 times more likely to be involved in a fatal crash, depending on their age and gender. Congress has accordingly determined driving with a blood alcohol concentration of .08 or greater should be prohibited nationwide, see Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 2008, 112 Stat. 337, and all 50 States, the District of Columbia, and Puerto Rico make it per se unlawful to drive with a blood alcohol concentration of .08 or greater.[15]

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[14] See National Highway Transportation Safety Admin. (NHTSA), *Traffic Safety Facts: .08 BAC Illegal* per se *Laws* 2 (Mar. 2004) (*.08 BAC Laws*) <http://www.nhtsa.dot.gov/people/injury/new-fact-sheet03/fact-sheets04/Laws-08BAC.pdf> (emphasis added).

[15] *State .08 BAC Laws.*

Finally, that defendants have been convicted under Section 66-8-102 while "exercising actual physical control" of non-moving vehicles does not mean that the conduct proscribed by Section 66-8-102 is not categorically injury-risking behavior. See *State* v. *Boone*, 731 P.2d 366, 367-368 (N.M. 1986) (upholding warrantless arrest of intoxicated individual discovered by police in the driver's seat of his automobile, stopped in a traffic lane with the engine running but the lights off); see also *State* v. *Johnson*, 15 P.3d 1233, 1240 (2000) (upholding convictions of intoxicated individuals discovered in the driver's seat of non-moving automobiles, with the key in the ignition, on private property). It may be that the defendants in these cases did not pose a serious risk of physical injury to the public at the moment when they were arrested. But see *ibid.* (explaining that "[a] person under the influence of intoxicating liquor or drugs who exerts actual physical control over a vehicle, is a threat to the safety and welfare of the public" because that person who "place[s] himself behind the wheel of the vehicle could * * * at any time start[] the automobile and drive[] away.") (internal quotation marks and citation omitted). But that does not distinguish New Mexico's DUI statute from any number of other offenses that are clearly encompassed by the ACCA's definition of "violent felony." See *James*, 127 S. Ct. at 1597. Just as an intoxicated driver might sit safely in a car with the keys in the ignition, so might a burglar break into a vacant home, far from anyone who might venture on the scene and confront him, see *ibid.*, or an arsonist set fire to an abandoned structure in a remote, uninhabited location. The categorical approach of *Taylor* does not require "that every conceivable factual offense covered by a statute must necessarily present a serious potential risk of in-

jury before the offense can be deemed a violent felony"; it requires only that, "in the ordinary case," the conduct proscribed by the statute of conviction "present[] a serious potential risk of injury to another." *Ibid.* In the ordinary case, felony DUI poses a serious risk of injury to others. It is, for that reason, a "violent felony" within the meaning of the ACCA.

B. Petitioner's Interpretation Of The ACCA Is Contrary To The Text Of The Statute

Petitioner's primary argument for reversal is that the ACCA's "otherwise" clause, properly understood, includes only felony offenses that *both* (1) involve conduct presenting a serious potential risk of physical injury, *and* (2) are "similar" to the enumerated offenses of burglary, arson, extortion, and explosives use in Section 944(e)(2)(B)(ii) "in that they are violent, active property crimes that are typically committed by career criminals as a means of livelihood and that are more dangerous when committed with firearms." Pet. Br. 14.

Petitioner's argument finds no support in ACCA's text. As an initial matter, not all of the crimes listed in clause (ii) share the attributes that petitioner identifies. It is not at all clear, for example, that the use of explosives would satisfy petitioner's gloss if it were not expressly enumerated. For related reasons, petitioner's proposed definition would be extremely difficult to administer. And in any event, nothing in the statute suggests that Congress intended to limit application of the ACCA to crimes that both involve conduct that presents a serious risk of physical injury and share other attributes, none of which is identified in the text of the statute, with the crimes of burglary, arson, extortion, and explosives use. Petitioner's effort to engraft this lengthy se-

ries of atextual limitations on the ACCA's definitional provision is unavailing.

1. ***The ACCA's residual provision does not broadly require "similarity" to the enumerated offenses***

The text of Section 924(e)(2)(B)(ii) provides that a felony offense that is not burglary, arson, extortion, or explosives use qualifies as an ACCA predicate if it involves conduct that presents a serious risk of injury to others. The text does not require that such an offense be "similar" to these enumerated crimes in any respect other than its potential to cause harm to others.

Contrary to petitioner's contention (Pet. Br. 19-22), the "similar crimes" approach finds no support in the statute's use of the word "otherwise" to introduce the residual provision. "Otherwise" does not mean, as petitioner would have it (*id.* at 20-21), "similar to" or "of the same kind as," such that any word or phrase follows the word "otherwise" must share unspecified attributes of the words or phrase that precede it. On the contrary, "otherwise," when used as an adverb, means "in a different manner" or "in another way." *Webster's New International Dictionary* 1729 (2d ed. 1954);[16] see *James*, 127

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[16] "Otherwise" can also be used to mean "in other respects." *Webster's New International Dictionary* 1729 (2d ed. 1954). In two of the three examples petitioner offers in support of his argument (Pet. Br. 21), this Court interpreted the word "otherwise" according to this usage, and not, as petitioner contends, to mean "'similar' to other entities." See *Southeastern Cmty. Coll.* v. *Davis*, 442 U.S. 397, 405-406 (1979) (interpreting statutory prohibition of discrimination against an "otherwise qualified handicapped individual" in federally funded programs "solely by reason of his handicap" to apply in the case of individuals "able to meet all of a program's requirements in spite of [their] handicap"); *United States* v. *Mississippi*, 380 U.S. 128, 136-138 (1965) (interpreting statutory guarantee of right to vote to persons

S. Ct. at 1602 (Scalia, J., dissenting). And "otherwise" does not remotely mean "likewise," which seems to be how petitioner is attempting to interpret it. The "otherwise" clause itself thus identifies the only defining attribute of crimes that fall within the ACCA's residual provision: that the offense "involve[] conduct that present a serious potential risk of physical force against another." 18 U.S.C. 924(e)(2)(B)(ii); see *James*, 127 S. Ct. at 1592; *id.* at 1602-1603 (Scalia, J., dissenting) ("[T]he most natural reading of the statute is that committing one of the enumerated crimes (burglary, arson, extortion or crimes involving explosives) is *one way* to commit a crime 'involv[ing] conduct that presents a serious potential risk of physical injury to another'; and that *other ways* of commiting a crime of that character similarly constitute 'violent felon[ies].'").

Given that Congress has already identified the single relevant defining characteristic of felonies that fall within the scope of the residual clause, it is neither necessary nor appropriate to resort to the canons of *ejusdem generis* and *noscitur a sociis* to identify *additional*

"otherwise qualified by law to vote * * * without distinction of race, color, or previous condition of servitude" to apply to persons who legally qualified by law to vote in all respects other than their race). Petitioner's third example concerns a statutory provision providing for Supreme Court review of the final judgments of the circuit courts of appeals "by certiorari or otherwise." *Huguley Mfg. Co.* v. *Galeton Cotton Mills*, 184 U.S. 290, 294-295 (1902) (citing Act of Mar. 3, 1891, ch. 517, § 6, 26 Stat. 828). The Court in *Huguley* did not interpret the phrase "by certiorari or otherwise" to mean that "the manner of reaching the court *must* be of the same kind as certiorari," Pet. Br. 21 (emphasis added); it simply held that, as a matter of fact, there was no relevant means of appealing to the Court other than certiorari or its equivalent. *Huguley*, 184 U.S. at 295.

characteristics of such offenses. In *James*, this Court rejected a similar argument that, because the "common attribute" of the enumerated offenses is that each is a completed offense, the residual provision must also encompass only completed offenses, and thereby excludes attempted burglary from the scope of the ACCA. The Court noted that "the most relevant common attribute of the enumerated offenses of burglary, arson, extortion, and explosives use is not 'completion,'" but rather "that all of these offenses, while not technically crimes against the person, nevertheless create significant risks of bodily injury or confrontation that might result in bodily injury." 127 S. Ct. at 1592. In the Court's view, to impose additional limitations not identified in the text of the statute "would unduly narrow" the "expansive phrasing" of the residual provision. *Ibid.* What was true in *James* is equally true in this case. Nothing in the plain language of the statutory definition reveals any intent to limit the residual provision to offenses that are generally "similar" to burglary, arson, extortion, and explosives use.

2. ***The residual provision is not limited to crimes involving the intentional use of force or a substantial risk that force will be used***

Failing to identify a broad set of "similar crimes" limitations in the text of the ACCA's definition of "violent felony," petitioner attempts to locate one such limitation in the term defined. Relying primarily on this Court's decision in *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), petitioner contends that the term "violent felony," separate and apart from Congress's definition of the term, indicates that the provision encompasses only offenses that are similar to burglary, arson, extortion, and explosives

use in that they involve "active violence." Pet. Br. 15-17. Petitioner does not specify precisely what he means by "active violence." But his test would effectively read the language in the statute at issue in *Leocal* into the ACCA, such that a felony offense under the ACCA would necessarily involve an intentional use of force, or "a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," *id.* at 16 (quoting 18 U.S.C. 16(b)). That effort effectively to alter the language of the ACCA cannot be sustained.

In *Leocal*, this Court considered whether DUI under Florida law is a "crime of violence" as defined in 18 U.S.C. 16, and therefore an "aggravated felony" that provides a basis for removal. 8 U.S.C. 1101(a)(43)(F), 1227(a)(2)(A)(iii). Section 16 of Title 18 defines the term "crime of violence" as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. 16. Citing its decision in *Bailey* v. *United States*, 516 U.S. 137 (1995), the Court held that the formulation "use . . . of physical force against the person or property of another" implies "active," intentional employment of force, and thus excludes DUI from the scope of Section 16(a). *Leocal*, 543 U.S. at 9-10. The Court further held that a DUI offense does not fall within the scope of Section 16(b), because Section 16(b) "contains

the same formulation," and thus requires that the perpetrator of the offense act in disregard of a substantial risk that he may be required to use physical force in committing a crime. *Id.* at 10-11. Finally, the Court found additional support for its conclusion in the "ordinary meaning" of the term "crime of violence," which, "combined with § 16's emphasis on the use of force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses." *Id.* at 11 (citing *United States* v. *Doe*, 960 F.2d 221, 225 (1st Cir. 1992)).[17]

Petitioner's argument would read an intentional use-of-force requirement into a statute that clearly does not provide for one. Unlike Section 16(b), the ACCA's residual provision does not define a "violent felony" according to the risk that force will be used, but according to the

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[17] In *Doe*, the First Circuit, in an opinion by then-Judge Breyer, held that possession of a firearm by a felon does not qualify as a "violent felony" under the ACCA. The court explained that it is difficult "to imagine such a risk of physical harm often accompanying the conduct that normally constitutes firearm possession." 960 F.2d at 224-225. The court also reasoned that, "[t]o include possession, one would have to focus upon the risk of direct *future* harm that present conduct poses," and that the term "violent felony" "calls to mind a tradition of crimes that involve the possibility of more closely related, active violence" than merely "risk-creating" crimes such as DUI. *Id.* at 225. Notably, however, *Doe* relied in part on the Sentencing Commission's judgment to exclude felon-in-possession crimes from its parallel definition of "crimes of violence," *ibid.*, and the Commission has made no such judgment as to DUI offenses. See pp. 20-21, *supra*. In addition, as explained below, the ACCA's expansively worded residual provision unambiguously encompasses "risk-creating" crimes. Clause (ii) of the residual provision makes clear that Congress intended the term "violent felony" to cover a broader range of conduct than the term itself might otherwise "call to mind."

risk that physical injury will result. As this Court recognized in *Leocal*, those are two different things. Distinguishing Section 16(b) from the Sentencing Guidelines provision defining "crime of violence" as a crime involving "conduct that presents a serious potential risk of physical injury to another"—language that is materially identical to the formulation used in the ACCA—the Court noted that "[t]he risk that an accident may occur when an individual drives while intoxicated is simply not the same thing as the risk that the individual may 'use' physical force against another in committing the DUI offense." 543 U.S. at 10 n.7 (quoting Sentencing Guidelines § 4B1.2(a)(2)). Petitioner would collapse that distinction.

In *Leocal*, the Court referred to the "ordinary meaning" of the term "crime of violence" to *confirm* its interpretation of the definition of that term, where the meaning of the definitional phrase "use of force" was in dispute. In this case there is no similar dispute concerning the meaning of any term Congress has used to define the class of offenses that qualify as predicates for sentencing enhancement. Petitioner has identified no language in the definition that requires illuminating by the "ordinary meaning" of the term defined. Rather, petitioner's argument is that his "active violence" gloss on the term "violent felony" *overrides* the plain meaning of the words Congress chose to define that term. When Congress explicitly defines a term, however, that definition controls. See *Babbitt* v. *Sweet Home Chapter of Communities for a Great Ore.*, 515 U.S. 687, 697-698 n.10 (1995); 2A Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 47:07, at 227-228 (6th ed. 2000) ("As a rule a definition which declares what a term means is binding upon the court."); *id.* at 232 ("A definition which

declares what a term means * * * excludes any meaning that is not stated.").

3. The residual provision is not limited to property crimes ordinarily committed as a means of livelihood that are more dangerous when committed with firearms

Petitioner's attempt (Pet. Br. 17-19) to limit the scope of the ACCA to "property offenses ordinarily committed as a means of livelihood" that "are more dangerous when committed with firearms" also fails. To begin with, petitioner's argument (*id.* at 19) that the "structure" of Section 924(e)(2)(B) limits the scope of the residual provision to "property crimes" merely repeats his argument that the offenses encompassed by the residual provision must share certain attributes, unspecified in the text, with the enumerated crimes of burglary, arson, extortion, and explosives use. For the reasons explained above, see pp. 25-27, *supra*, that argument lacks merit.

As for the "means of livelihood" and crimes "more dangerous when committed with a firearm" limitations, petitioner purports (Pet. Br. 17-19) to find support in the short title of the ACCA, the "Armed Career Criminal Act." According to petitioner, this title "restricts the scope of the 'otherwise' clause to serve the obvious intent of the Act," namely, "to keep firearms out of the hands of career criminals."

Petitioner's argument fails at the outset, since "the title of a statute * * * cannot limit the plain meaning of the text." *Pennsylvania Dep't of Corrs.* v. *Yeskey*, 524 U.S. 206, 212 (1998) (quoting *Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 528-529 (1947)) (alterations omitted). The title of a statute is useful in statutory interpretation "only when it sheds light on some ambigu-

ous word or phrase." *Ibid.* Petitioner has identified no word or phrase in the statute that he claims is ambiguous. Consideration of the title of the statute—which, as the court of appeals noted (J.A. 92), appears nowhere in the United States Code—is unwarranted.

In any event, while it is unquestionably true that the ACCA is designed "to keep firearms out of the hands of career criminals," Pet. Br. 18, it does not follow that the ACCA applies only to persons who are "career criminals" in the sense that they commit crime as a means of livelihood (as opposed to simply habitual offenders with a different day job), or persons who have committed crimes that would be more dangerous if committed with a firearm. Congress has imposed livelihood-type limitations in other laws, see 21 U.S.C. 848, but it did not do so here.

Even if, as petitioner argues, Congress's purpose when it initially enacted the ACCA in 1984 was to target criminals who made their living by engaging in robbery and burglary—the only two offenses that qualified as predicates for enhanced sentencing under that first version of the statute, see *Taylor*, 495 U.S. at 581—when it drafted Section 924(e)(2)(B) in 1986 to expand the range of predicate offenses covered by the statute, it did not limit the covered offenses solely to crimes ordinarily committed as a means of livelihood. Not all of the crimes encompassed by the ACCA's definition of "violent felony" are ordinarily committed "as a means of livelihood." Offenses involving the use of force that fall within the scope of Section 924(e)(2)(B)(i), such as assault, murder, and rape, are not ordinarily committed for the purpose of financial gain. Nor are all the offenses listed in Section 924(e)(2)(B)(ii)—burglary, arson, extortion, and use of explosives—characteristically committed as means of livelihood. Although there are undoubtedly some profes-

sional arsonists who make their living by collecting insurance proceeds, see, *e.g.*, *United States* v. *Korando*, 29 F.3d 1114 (7th Cir. 1994) (upholding defendant's conviction for involvement in a murder- and arson-for-profit ring under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*), persons frequently commit arson for a wide array of reasons other than insurance fraud, including vengeance, vandalism, and to conceal other crimes.[18] A person who commits a felony offense "involv[ing] the use of explosives" is at least equally unlikely to do so as a matter of vocation. It is, moreover, difficult to see how possession of a firearm would make either type of offense more dangerous, except insofar as any person caught in the midst of a criminal act—including, presumably, driving under the influence—generally poses a greater threat to an intervenor when he is armed.

The purpose petitioner ascribes to Section 924(e) is in fact the demonstrable purpose behind a separate provisions altogether—Section 924(c), which provides a mandatory minimum sentence of five years for any person "who, during and in relation to any crime of violence * * * uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm." 18 U.S.C. 924(c)(1)(A). That provision was designed to avoid the increased dangers that weapons add to violent crimes and to persuade the person who intends to commit such a crime to "leave his gun at home." *Muscarello* v. *United States*, 524 U.S. 125, 132 (1998) (quoting 114 Cong. Rec. 22,231 (1968) (Rep. Poff)). Section 924(e), however, serves a different purpose. As the statutory text itself makes clear, the ACCA is not designed to address the dangers associated

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[18] See generally *Arson in the United States*.

with the use of firearms during and in relation to a particular crime, but rather the dangers associated with possession of firearms by persons who have repeatedly committed serious criminal offenses that put the public at risk, and in so doing have demonstrated that they have little regard for the safety and well being of others. Congress determined that such individuals not only should be barred from possessing firearms, see 18 U.S.C. 922(g)(1), but should face significant consequences for violating that prohibition.

4. ***The residual provision does not categorically exclude offenses without a* mens rea *element***

Finally, petitioner argues (Pet. Br. 34-37) that the residual provision encompasses only offenses that have a *mens rea* element, and therefore must be construed to exclude felony DUI under New Mexico law, which, like other State DUI laws, makes driving under the influence a strict-liability offense. Nothing in the text of the ACCA supports that limitation. If the residual provision included only offenses involving a substantial risk that force will be used, then such a *mens rea* requirement might be appropriate. See *Leocal*, 543 U.S. at 9. But the ACCA is not so limited: The ACCA is founded on an objective risk of injury, not on the use of force, and nothing in the statute suggests that a particular *mens rea* is required to commit a predicate offense, so long as the predicate offense presents a serious risk of physical injury.

The presumption that Congress intends to require *mens rea* as an element of a crime, *Staples* v. *United States*, 511 U.S. 600, 605-606 (1994), has no applicability to this recidivist *sentencing provision*. Congress plainly *has* required *mens rea* as an element of the underlying federal crime for which petitioner is being punished.

Before a defendant may be considered for sentencing under the ACCA, the defendant must "knowingly" possessing a firearm after being convicted of a felony. 18 U.S.C. 922(g)(1), 924(a)(2) and (e)(1). The presumption of *mens rea* does not reach back into prior offenses for which a defendant has already been convicted and that may now enhanced his sentence. And even if the presumption against crimes without a *mens rea* element applied not only to federal crimes defined by Congress, but also to Congress's definition of the class of criminal convictions that qualify as predicates for enhanced sentencing, the presumption would have no force here. DUI offenses are not typical strict-liability crimes. As the Seventh Circuit has observed, the dangers of drunk driving are well known, *Rutherford*, 54 F.3d at 376, particularly to an individual who has repeatedly been convicted for that offense. To disregard those dangers is, by its nature, "a reckless act, perhaps an act of gross recklessness." *Ibid.* And New Mexico courts have made clear that "[v]oluntarily driving a vehicle while under the influence is an act malum in se and * * * *is substantial evidence of criminal intent.*" *State* v. *Dutchover*, 509 P.2d 264, 267 (N.M. Ct. App. 1973) (emphasis added). Courts do not require more specific evidence of intent, however, because allowing persons charged with DUI to defend their actions on the ground that they were "too intoxicated to form the conscious intent to drive drunk" would be "absurd and undoubtedly contrary to the statute's purpose." *State* v. *Harrison*, 846 P.2d 1082, 1087 (N.M. Ct. App. 1992); cf. *Montana* v. *Egelhof*, 518 U.S. 37, 44-45 (1996) (plurality opinion). The knowing nature of the conduct that produces intoxication combined with the inherent recklessness of the ensuing conduct more than suffices.

Nor does consideration of the purpose of the statute suggest a different result. A *mens rea* requirement cannot be inferred solely on the basis of Congress's purported concern with "career criminals," as petitioner defines the term (Pet. Br. 35). Congress nowhere required knowing pursuit of a livelihood as a hybrid form of *mens rea* for the ACCA. The purpose of the statute is not only to keep firearms out of the hands of persons who have repeatedly proved themselves ready and willing to use force when necessary in the commission of crime—the purpose served by Section 924(c)—but more broadly to keep firearms out of the hands of persons who "have a confirmed history of displaying contempt for human life or safety." J.A. 94. Enhancing the sentence of a person who repeatedly drives while intoxicated is entirely consistent with that purpose.

C. The Legislative History Does Not Support Petitioner's Interpretation

1. Petitioner contends (Pet. Br. 25-28) that legislative history supports his reading of the statute to exclude all offenses that are not "violent, active, property crimes that are typical of career criminals, and that are more dangerous when committed with firearms." Legislative history is relevant, however, only to the extent that it "shed[s] a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 567-568 (2005). Petitioner has identified no language that he claims is ambiguous, much less an ambiguity that could plausibly be illuminated by resort to legislative history—even if, as petitioner claims, that history showed that Congress, despite enacting an expansive residual

provision, nevertheless intended to impose a series of unspecified limitations on its application.

2. In any event, the legislative history of the ACCA does not show that Congress understood the provision to mean anything other than what it says: that a felony offense qualifies as a predicate offense for sentencing enhancement purposes as long as it involves conduct that presents a serious risk of physical injury to another. When Congress revised the ACCA in 1986 to expand the class of predicate offenses beyond robbery and burglary, it first considered two competing bills: one that covered as violent felonies crimes that had as an element the use of force as well as any felony "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," *Taylor*, 495 U.S. at 583 (quoting S. 2312, 99th Cong., 2d Sess. (1986) and H.R. 4639, 99th Cong., 2d Sess. (1986)), and one that was more limited to the use of force as an element, *ibid.* (quoting H.R. 4768, 99th Cong., 2d Sess. 1986)). Both bills came in for criticism, the first as potentially too broad, the second as too narrow. *Id.* at 584-586. A new bill emerged that defined the term violent felony to include a crime that:

> (i) has an element the use, attempted, use or threatened use of force against the person of another; or
>
> (ii) involves conduct that presents a serious potential risk of physical injury to another.

H.R. 4885, 99th Cong., 2d Sess. (1986), quoted in *Taylor*, 495 U.S. at 586. That provision, with its freestanding application to injury-risking crimes, was understood by the House Committee on the Judiciary to encompass property crimes such as "burglary, arson, extortion and * * * similar crimes * * * *where the conduct in-*

volved presents a serious risk of injury to a person." H.R. Rep. No. 849, 99th Cong., 2d Sess. 3 (1986) (emphasis added). "The provision as finally enacted, however, added" the listed crimes to the pre-existing bill's coverage of any crime that "involves conduct that presents a serious potential risk of physical injury to another." *Taylor*, 495 U.S. at 587 (internal quotation marks omitted).

This drafting sequence suggests that Congress understood what is now the "otherwise" clause to represent a broad and independently operative category, and the legislature then added the listed offenses to remove any doubt about their coverage. See *Taylor*, 495 U.S. at 589 (addition of the enumerated offenses "seemingly was meant simply to make explicit the provision's implied coverage of crimes such as burglary"); *McCall*, 439 F.3d at 971 ("[t]he form of the addition [to the statute] made the 'otherwise involves' provision look like a catchall when in fact it was initially the operative provision," and therefore "it is wrong to infer that Congress intended to limit the 'otherwise involves' provision to offenses that are similar to the enumerated add-ons").

3. The committee hearings that petitioner cites (Pet. Br. 26-27) do not justify the conclusion that Congress implicitly meant to confine the "otherwise" provision to crimes that were "similar" to the listed crimes. Contrary to petitioner's characterization, the hearings were not narrowly focused on "concern[s] for the eruption of violence during a firearm-wielding offender's commission of a property crime as a means of criminal livelihood." *Id.* at 28. On the contrary, the hearings indicate that the Congress that enacted the definition of "violent felony" currently in force was concerned with the "habitual offender," and not only the offender who earns a living by

committing crime for profit, who commits crimes, such as arson, "where the * * * loss of life could be serious." See, *e.g.*, *Armed Career Criminal Legislation: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 8, 12 (1986) (statement of Rep. Wyden).

4. Petitioner emphasizes the House Report's focus on "property" crimes and its reference to crimes "similar" to burglary, arson, extortion, and use of explosives. See Pet. Br. 28 (quoting *Taylor*, 495 U.S. at 587 (quoting H.R. Rep. No. 849, *supra*, at 3)). But the House Report does not indicate that Congress believed that "violent felonies" under its definition would be *limited* to property crimes. To the contrary, the language of the bill covered those crimes as a subset of a broad category, the later addition of those examples did not narrow the more general clause itself, and the only textual yardstick for measuring "similarity" was in relation to the risk of physical injury to another.

When Congress revised the definition of "violent felony" in H.R. 4885 to add explicit references to "burglary, arson, extortion" and "use of explosives," it did not also add limitations to crimes involving property, crimes made more dangerous by the use of firearms, or crimes generally committed as a means of livelihood. This suggests that Congress added the reference to these crimes simply to clarify that they were included in the scope of the "violent felony" definition, see *Taylor*, 495 U.S. at 589, not to change its meaning.

D. The Doctrine Of Constitutional Avoidance Does Not Apply

Petitioner's invocation of the doctrine of constitutional avoidance (Pet. Br. 44-51) fails because petitioner

cannot identify a serious constitutional question that his construction would avoid.

1. Petitioner contends that interpreting the residual provision to call for an inquiry into whether a felony offense presents a "serious potential risk of physical injury" is unconstitutionally vague, and is thus an interpretation to be avoided if fairly possible. But as petitioner acknowledges (Pet. Br. 48), this Court has already rejected the argument that a statutory provision that applies to conduct presenting a "serious potential risk of physical injury" is "so indefinite as to prevent an ordinary person from understanding what conduct it prohibits." *James*, 127 S. Ct. at 1598 n.6; see *ibid.* (noting that "[s]imilar formulations have been used in other federal and state criminal statutes"). An inquiry into the risk posed by the criminal offense in question is, moreover, indisputably what the statute calls for. *Id.* at 1597; accord *id.* at 1602-1603 (Scalia, J., dissenting). There is no fairly possible construction of the statute by which courts might dispense with application of the serious-risk requirement.

It may be true, as petitioner argues (Pet. Br. 48-49), that the serious-risk requirement is easier to apply when the risks of a unlisted offense are comparable to the risks of a closely analogous listed offense, as was the case in *James* itself. But to say that it is *easier* to evaluate the risk of an analogous, comparably risky offense is not to say that it is constitutionally impermissible to apply the serious-risk requirement to a unlisted offense that is not closely analogous to the offenses of burglary, arson, extortion, or explosives use. See *James*, 127 S. Ct. at 1598 n.6. Moreover, that there may be cases that are relatively clear because of the similarity of the offense at issue to the four enumerated offenses does not mean that

petitioner's atextual test attempting to inquire into various dimensions of similarity is easier to administer or less vague than the definition that Congress actually adopted. It is not clear how inquiry into whether crimes are "typically committed by career criminals" as a means of livelihood or are inherently "more dangerous when committed with firearms" will add clarity to the ACCA.

2. Petitioner also argues that the serious-risk requirement violates separation-of-powers principles because evaluating whether a particular offense presents a serious potential risk of physical injury to another allows courts to "defin[e] crimes and fix[] penalties," which are "legislative, not judicial, functions." Pet. Br. 49 (quoting *United States* v. *Evans*, 333 U.S. 483 (1948)). Petitioner's reliance on *Evans* is misguided. In *Evans*, the Court held that, where Congress has defined a crime but failed to prescribe a penalty for its commission, the Court's selection of a penalty from among several plausible possibilities would be purely speculative and therefore "outside the bounds of judicial interpretation." 333 U.S. at 484-485, 495. In this case, by contrast, Congress has defined the crime in question, and it has fixed the penalties for its commission. This case thus does not call on the Court to "plug [a] hole in the statute," *id.* at 487; it calls on the Court to interpret the statute. That is a judicial function.

Nor is determining whether particular conduct presents a serious risk of injury "an essentially legislative judgment." Pet Br. 50 (internal quotation marks and citation omitted). The law often calls for courts to assess risk. As this Court noted in *James*, many federal and state statutes contain "[s]imilar formulations." 127 S. Ct. at 1598 n.6 (citing, inter alia, 18 U.S.C. 2332b(a)(1)(B) (defining "terrorist act" to include conduct that, among

other things, "creates a substantial risk of serious bodily injury to any other person")); see 18 U.S.C. 844(f)(2) (prohibiting malicious destruction of property by fire or explosive and providing penalties where, inter alia, the offense "creates a substantial risk of injury to any person"); 21 U.S.C. 858 (providing criminal penalties where manufacture of a controlled substance "creates a substantial risk of harm to human life"). Statutes that require judicial or jury assessments of the substantiality of risk are also ubiquitous in the States.[19] Determining

[19] All or virtually all States have enacted criminal laws that define reckless endangerment, kidnaping, resisting arrest, or other offenses by using some formulation similar to "serious risk of physical injury." See, *e.g.*, Ala. Code § 13A-6-24(a) (Michie 1975) ("A person commits the crime of reckless endangerment if he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person."); Alaska Stat. § 11.41.300(a)(2)(B) (Lexis/Nexis 1962) ("A person commits the crime of kidnapping if * * * the person restrains another * * * under circumstances which expose the restrained person to a substantial risk of serious physical injury"); *id.* § 11.56.700 (making it a criminal offense to resist arrest by, inter alia, "any means that creates a substantial risk of physical injury to any person"); Ariz. Rev. Stat. Ann. (2001) § 13-1201(A) ("A person commits endangerment by recklessly endangering another person with a substantial risk of imminent death or physical injury."); *id.* § 13-2508(A)(2) (making it a crime to resist arrest by, *inter alia*, "[u]sing any * * * means creating a substantial risk of causing physical injury to the peace officer or another"); Ark. Code Ann. § 5-11-103(a) (1997) (providing that a person commits first-degree false imprisonment if that person restrains another "in a manner that exposes the other person to a substantial risk of serious physical injury"); *id.* § 5-13-206(a) (providing that a person commits second-degree assault "if he or she recklessly engages in conduct that creates a substantial risk of physical injury to another person"); Cal. Penal Code § 278.6(a)(1)(a) (West 1999) (providing that, in child abduction cases, it is an aggravating factor when "[t]he child was exposed to a substantial risk of physical injury or illness"); Colo. Rev. Stat. § 18-3-208 (2006) ("A person who recklessly engages in conduct which creates a substantial risk of serious bodily injury to

whether the risk presented by defined conduct qualifies as "substantial" or "serious" for purposes of applying such rules is a matter well within the constitutional competence of the judiciary. See, *e.g.*, *Farmer* v. *Brennan*, 511 U.S. 825, 828 (1994) (describing contours of Eighth Amendment claim concerning a prison official's deliberate indifference to a "substantial risk of serious harm"). Nor is it clear why assessing risk is any more inherently legislative than assessing crimes typically committed by career offenders that are more dangerous—*i.e.*, risky—when committed with firearms.

3. Petitioner next suggests (Pet. Br. 49-51) that the ACCA's serious-risk requirement raises Fifth and Sixth Amendments concerns under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and its progeny. The Court has already rejected this argument. As the Court has noted, whether a felony offense qualifies as a "violent felony" under the ACCA is a legal question, not a factual one. *James*, 127 S. Ct. at 1600. A court applying *Taylor*'s categorical approach does not assess any facts specific to a petitioner's prior conviction, but rather looks to the elements of the crime of conviction to determine whether they satisfy the requirements of the ACCA. That inquiry raises no constitutional doubts under *Apprendi*. *Ibid.*

E. The Rule of Lenity Does Not Apply

Contrary to petitioner's argument (Pet. Br. 51-53), the rule of lenity does not apply in this case. That rule is "reserved for cases" involving a "grievous ambiguity" in the statutory text such that, "after seizing everything from which aid can be derived," the Court "can make no more than a guess as to what Congress intended." *Muscarello*, 524 U.S. at 138-139 (internal quotation

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another person commits reckless endangerment.").

marks and citations omitted). Rule of lenity concerns are particularly attenuated when the sentencing provision in question does not regulate primary conduct, but instead speaks only to the proper legal classification of convictions that an offender has already sustained and whose status will be determined by a court, rather than as a matter of prosecutorial discretion.

Petitioner does not identify any particular language in the statute that he claims is ambiguous. He instead contends (Pet. Br. 53) that his own arguments for engrafting a series of atextual limitations on the reach of the ACCA create "ambiguity * * * whether [driving while intoxicated] is a 'violent felony.'" That bootstrap will not work. Petitioner only seeks to create ambiguity that is absent in the plain meaning of the words Congress wrote. Petitioner's convictions for felony DUI constitute convictions for an offense "involv[ing] conduct that presents a serious potential risk of physical injury" to others, 18 U.S.C. 924(e)(2)(B)(ii). They therefore qualify as predicate offenses under the ACCA.

F. Petitioner's Felony DUI Convictions Are Crimes "Punishable By Imprisonment For A Term Exceeding One Year"

Petitioner alternatively contends (Pet. Br. 37-41) that his felony DUI convictions, even if they qualify as presenting the requisite risk of harm, do not qualify for sentencing under the ACCA because those convictions do not meet the requirement for a "violent felony" that an offense be "punishable by imprisonment for a term exceeding one year." 18 U.S.C. 924(e)(2)(B). Petitioner raised this issue in passing in the district court (J.A. 21-22), and the district court rejected the contention (J.A. 48 n.2). The issue was not raised by petitioner in the court of appeals, discussed in the court of appeals' opin-

ion, or mentioned in the petition for certiorari, although the question presented in the petition appears to be broad enough to encompass the issue.

Regardless of whether the question is properly presented for plenary review here, petitioner's claim is identical in substance to the issue on which this Court granted certiorari in *United States* v. *Rodriquez*, No. 06-1646 (to be argued Jan. 15, 2008). As the government explained in its brief in *Rodriquez* (a copy of which is being served on petitioner), for purposes of the ACCA, the relevant "maximum term of imprisonment" for a repeat offender is the maximum sentence prescribed by law for recidivists. Here, petitioner's ACCA sentences rest on his fourth (and successive) convictions for a New Mexico DUI offense. Under New Mexico law, the fourth and each subsequent conviction constitutes a felony. N.M. Stat. Ann. § 66-8-102(G). For the reasons explained in the government's brief in *Rodriquez*, petitioner's attempt to claim the lower "maximum" punishment applicable to first-, second-, and third-time DUI offenders lacks merit, and his felony convictions are punishable by more than one year of imprisonment, as the ACCA requires. Indeed, if petitioner's contention were correct, it would lead to the paradoxical situation in which the "maximum term of imprisonment" for petitioner's repeat-offender crimes would be lower than the terms of imprisonment that petitioner actually received. Petitioner identifies no valid basis for attributing that bizarre result to the statute.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

LEONDRA R. KRUGER
Assistant to the Solicitor General

RICHARD A. FRIEDMAN
Attorney

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APPENDIX

1. 18 U.S.C. 922(g)(1) provides in pertinent part:

Unlawful acts

* * * * *

(g) It shall be unlawful for any person—

* * * * *

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year[,]

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

* * * * *

2. 18 U.S.C. 924(e) provides in pertinent part:

Penalties

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

* * * * *

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, * * * that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another[.]

* * * * *

3. N.M. Stat. Ann. 31-18-15(A) (Michie 2002) provides in pertinent part:

Sentencing authority; noncapital felonies; basic sentences and fines; parole authority; meritorious deductions.

If a person is convicted of a noncapital felony, the basic sentence of imprisonment is as follows:

* * * * *

(6) for a fourth degree felony, eighteen months imprisonment.

* * * * *

4. N.M. Stat. Ann. 66-8-102 (Michie 2002) provides in pertinent part:

Person under the influence of intoxicating liquor or drugs; aggravated driving while under the influence of intoxicating liquor or drugs; penalty.

A. It is unlawful for any person who is under the influence of intoxicating liquor to drive any vehicle within this state.

* * * * *

C. It is unlawful for any person who has an alcohol concentration of eight one-hundredths or more in his blood or breath to drive any vehicle within this state.

* * * * *

E. Every person under first conviction under this section shall be punished * * * by imprisonment for not more than ninety days or by a fine of not more than five hundred dollars ($500), or both * * *.

F. A second or third conviction under this section shall be punished * * * by imprisonment for not more than three hundred sixty-four days or by a fine of not more than one thousand dollars ($1,000), or both * * *.

* * * * *

G. Upon a fourth or subsequent conviction under this section, an offender is guilty of a fourth degree felony, as provided in Section 31-18-15 NMSA 1978, and shall be sentenced to a jail term of not less than six months, which shall not be suspended or deferred or taken under advisement.

* * * * *